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PP

v.

OUSENG SAMA-AE

B

COURT OF APPEAL, PUTRAJAYA

GOPAL SRI RAM JCA

MOHD GHAZALI YUSOFF JCA

HASAN LAH JCA

[CRIMINAL APPEAL NO: D-05-75-2003]

C

20 NOVEMBER 2007

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Appeal by prosecution against reduction of charge to one of possession - Whether prima facie case of trafficking made out - Presumption under s. 37(da) - Whether trial judge misdirected himself in providing explanation for conduct of accused - Whether accused should have been called to enter defence on original charge of trafficking*

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The accused was charged with trafficking in a dangerous drug (1996.7 grams of cannabis) under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act'). At the close of the case for the prosecution, the learned High Court judge held that a *prima facie* case of trafficking had not been made out and accordingly reduced the charge to one of possession under s. 6 read with s. 39A(2) of the Act. The accused pleaded guilty to the lesser charge and was dealt with accordingly. This was the appeal by the Public Prosecutor against the decision of the High Court.

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Held (allowing the appeal)

Per Gopal Sri Ram JCA delivering the judgment of the court:

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(1) In order to establish a *prima facie* case against the accused by reliance on the presumption under s. 37(da) of the Act, the prosecution had to prove: (i) that the accused was in actual physical possession of the drug in question; and (ii) that the accused at the material time had knowledge of the drug found to be in his possession, that is to say that he had "*mens rea* possession". The first element was easily established here because the accused did have custody and control of the red bag containing the dangerous drug in question ('exh. P18').

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Indeed, it was quite clear from all the evidence that he was exercising dominion over exh. P18 at all material times. The only question was whether he had *mens rea* possession. (para 3)

- (2) From the proved and admitted facts of this case, the accused came from some other place to the house in question. He brought exh. P18 along with him. The drug found in exh. P18 – almost two kg of cannabis – was far in excess of what may be needed for personal consumption. In the absence of any explanation from the accused, it was a fair inference the drug was obviously intended for some person, known or unknown to the accused. Or, to borrow the more elegant words of Lord Diplock in *Ong Ah Chuan v. PP*, it was a fair inference that the accused's purpose here was "to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find." Added to all this was the demeanour of the accused when confronted by PW3, the police officer who seized and searched exh. P18. The accused began shivering and urinated in his trousers, which were sure signs of fear. If taken alone they may be equivocal in terms of evidentiary value, but there was the other evidence to which this court had already adverted. And when taken together, the conduct of the accused on being confronted lent strength to the *prima facie* inference that he had *mens rea* possession of the proscribed drug. Also, the evidence of the accused's such conduct was plainly admissible by virtue of s. 8 of the Evidence Act 1950. *Ong Ah Chuan v. PP* (foll). (paras 4, 5 & 6)
- (3) The learned trial judge did not adequately evaluate the prosecution's evidence and draw the irresistible inferences admitted by that evidence. Had he done so, he would have come to the conclusion that the prosecution had made out a *prima facie* case of trafficking. That was the first error into which the learned judge fell. (para 8)
- (4) The second infirmity in the learned judge's judgment was that he appeared to have provided an explanation for the accused's conduct on being confronted by the police. He said that the accused's conduct was equally consistent with guilt of an unrelated offence, namely, being present in the country illegally. However, there was not a scintilla of evidence to support such a conclusion. It was clearly for the accused to

- A give an explanation as to why he behaved in the manner in which he did. It was also for him to rebut the presumption of trafficking raised against him by the operation of s. 37(da) of the Act. The learned judge misdirected himself in providing an explanation for the accused which the latter was bound to provide in the usual way. (para 9)
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[Order of judge found to be unsupportable and, thereby, set aside. Matter to be remitted to same judge with a direction to him to call upon accused to enter his defence on original charge of trafficking.]

- C ***Bahasa Malaysia Translation Of Headnotes***

Tertuduh dituduh dengan kesalahan mengedar dadah berbahaya (1996.7 gram cannabis) di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Di akhir kes pendakwaan, yang arif hakim Mahkamah Tinggi memutuskan bahawa suatu kes *prima facie* pengedaran telah gagal dibuktikan sekaligus meminda pertuduhan kepada pertuduhan milikan di bawah s. 6 dibaca bersama dengan s. 39A(2) Akta. Tertuduh mengaku bersalah kepada pertuduhan lebih ringan tersebut dan dijatuhkan hukuman sekadarnya. Ini adalah rayuan oleh Pendakwa Raya terhadap keputusan Mahkamah Tinggi.

Diputuskan (membenarkan rayuan)

Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

- F (1) Untuk mewujudkan kes *prima facie* terhadap tertuduh dengan bergantung kepada anggapan di bawah s. 37(da) Akta, pendakwa hendaklah membuktikan: (i) bahawa tertuduh mempunyai milikan fizikal sebenar dadah berkenaan; dan (ii)
- G bahawa tertuduh pada waktu material mempunyai pengetahuan tentang apa yang dijumpai dalam milikannya, iaitu bahawa beliau mempunyai "*mens rea* milikan". Di sini, unsur ini boleh dibuktikan dengan mudah kerana tertuduh memang mempunyai jagaan dan kawalan ke atas beg merah yang mengandungi dadah berbahaya berkenaan ('exh. P18'). Malah, adalah jelas dari keterangan-keterangan bahawa beliau mempunyai penguasaan terhadap exh. P18 pada semua waktu material. Maka satu-satunya soalan yang berbangkit adalah sama ada
- H beliau mempunyai *mens rea* milikan.
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- (2) Berdasarkan fakta kes yang dibuktikan dan diakui, tertuduh datang ke rumah berkenaan dari satu tempat lain. Beliau membawa exh. P18 bersamanya. Dadah yang dijumpai di dalam exh. P18 – cannabis berjumlah hampir dua kg – adalah jauh lebih banyak dari apa yang diperlukan untuk kegunaan sendiri. Dalam ketiadaan sebarang penjelasan oleh tertuduh, maka inferens boleh dibuat bahawa dadah adalah untuk orang lain, sama ada dikenali atau tidak dikenali oleh tertuduh. Atau, meminjam kata-kata Lord Diplock yang lebih elok di dalam *Ong Ah Chuan v. PP*, adalah satu inferens yang adil bahawa tujuan tertuduh di sini adalah “untuk menyerahkan milikan dadah atau sebahagian darinya kepada seorang lain sama ada sudah dikenalnya ataupun tidak ataupun kepada seorang bakal pembeli yang ia berharap untuk mencarinya.” Ditambah kepada semua ini adalah tingkah laku tertuduh apabila bersemuka dengan PW3, pegawai polis yang merampas dan memeriksa exh. P18. Tertuduh menggigil dan terkencing di dalam seluarnya, yang mana ini merupakan tanda-tanda ketakutan yang jelas. Sebagai nilai keterangan, semua ini bersifat equivocal jika ditimbang secara bersendirian, namun terdapat keterangan-keterangan lain di sampingnya yang telah pun dirujuk oleh mahkamah ini. Apapun, dinilai secara menyeluruh, kelakuan tertuduh sewaktu disemukai telah memperkuat inferens *prima facie* bahawa beliau mempunyai *mens rea* milikan dadah terlarang tersebut. Begitu juga, keterangan mengenai kelakuan tertuduh sedemikian adalah boleh diterima-masuk di bawah s. 8 Akta Keterangan 1950. *Ong Ah Chuan v. PP* (diikuti).
- (3) Yang arif hakim tidak menilai dengan secukupnya keterangan pendakwaan dan gagal merumuskan inferens yang pasti boleh dibuat dari keterangan tersebut. Jika beliau berbuat demikian, beliau tentu akan mencapai rumusan bahawa pendakwaan telah membuktikan kes *prima facie* pengedaran. Ini adalah kekhilafan pertama yang dilakukan oleh yang arif hakim.
- (4) Kelemahan kedua penghakiman yang arif hakim adalah beliau nampaknya telah membuat penjelasan mengenai kelakuan tertuduh apabila disemukai oleh polis. Beliau berkata bahawa kelakuan tertuduh adalah sama konsistennya dengan rasa bersalah atas suatu kesalahan lain, iaitu, kerana datang ke negara ini secara haram. Bagaimanapun, tiada sekelumit keterangan pun bagi menyokong rumusan sedemikian. Yang

- A jelas, terpulanglah kepada tertuduh untuk memberikan penjelasan tentang mengapa beliau berkelakuan sebegitu rupa. Juga, terpulang kepadanya untuk menyangkal anggapan pengedaran yang dibangkitkan terhadapnya melalui operasi s. 37(da) Akta. Yang arif hakim telah tersalah arah akan dirinya apabila memberikan penjelasan bagi pihak tertuduh yang menjadi tanggungjawab pihak terkemudian itu untuk mengemukakannya dengan cara yang biasa.
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- C *[Perintah hakim tidak dapat dipertahankan dan diketepikan. Perkara diremit kepada hakim yang sama dengan arahan supaya beliau memanggil tertuduh untuk membela diri atas pertuduhan asal pengedaran.]*

Case(s) referred to:

- Ong Ah Chuan v. PP [1981] 1 MLJ 64 (*foli*)
D PP v. Badrulsham Baharom [1987] 1 LNS 72 (*refd*)
Prakash Chand v. State AIR [1979] SC 400 (*refd*)

Legislation referred to:

- Dangerous Drugs Act 1952, ss. 6, 37(da), 39A(2), 39B(1)(a)
Evidence Act 1950, s. 8
E For the appellant - Eddie Yeo DPP
For the respondent - Muhammad Hasif Hassan; M/s Hasif, Azham, Rizal & Co

- F *[Appeal from High Court, Kota Bharu; Criminal Trial No: 45-06-2002]*
Reported by Suresh Nathan

JUDGMENT

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Gopal Sri Ram JCA:

- H [1] The accused here was charged for trafficking in a dangerous drug under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (“the Act”). At the close of the case for the prosecution, the learned judge held that a *prima facie* case of trafficking had not been made out. He accordingly reduced the charge to one of possession under s. 6 read with s. 39A(2) of the Act. The accused pleaded guilty to the lesser charge and was dealt with accordingly. The Public Prosecutor being dissatisfied with the decision of the High Court has appealed to us. We heard and allowed the appeal and made certain consequential orders to which we will refer later in this judgment.
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[2] The facts relevant to the appeal are as follows. On 10 January 2002, Assistant Superintendent of Police Ramli Muda (PW3) acting on information he received proceeded to house GDMA 8/1 at Kampong Berek, Gong Dermin, Banggu, Kota Bharu. He was accompanied by a police party. On arrival at the scene, PW3 and his team lay in ambush. He observed the accused in the veranda of the house. PW5 (Tuan Mazuan bin Tuan Yusof) testified as to how the accused came to be there. This witness was seated under a tree near the house in question. He saw a Kancil motor car arrive. The accused alighted from the car. He was carrying red bag (exh. P18). It was slung over his right shoulder. He went up to the house and knocked on the door. It was opened by Tuan Mazlan bin Tuan Yusof (PW6). The accused asked for PW8 (PW6's father). PW8 was not at home at the time. He returned later. PW6 then informed Eyot bte Kidar (PW7) of the accused's arrival. PW7 emerged for a moment, had a look at the accused and then returned to the kitchen to fetch him some refreshment. The accused then took a seat in the veranda of the house. PW8 then arrived and about 10 minutes passed. It was at this stage that PW3 approached the accused and introduced himself to the accused as a police officer. The accused began to shiver and urinated in his trousers. PW3 seized exh. P18 and searched it. In it he found a substance which on subsequent chemical analysis was found to be 1996.7 grams of cannabis. The accused was later charged for trafficking in that drug.

[3] Now, in order to establish a *prima facie* case against the accused by reliance on the presumption under s. 37(da) of the Act, the prosecution had to prove: (i) that the accused was in actual physical possession of the drug in question; and (ii) that the accused at the material time had knowledge of the drug found to be in his possession, that is to say that he had "*mens rea* possession": See, *Public Prosecutor v. Badrulsham bin Baharom* [1987] 1 LNS 72. The first element was easily established here because the accused did have custody and control of the bag. Indeed, it is quite clear from the evidence that he was exercising dominion over exh. P18 at all material times. The only question is whether he had *mens rea* possession. Like any other mental ingredient in an offence, this is to be inferred from the proved and admitted facts of each case.

[4] As Lord Diplock said in *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64:

- A Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, **the purpose with which he did an act is a matter of inference from what he did.**
- B Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible –
- C even if there were no statutory presumption such as is contained in section 15 of the Drugs Act.

- As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. (emphasis added.)
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- [5] Now apply that approach here. The accused came from some other place to the house in question. He brought exh. P18 along with him. The drug found in the bag exh. P18 – almost 2 kg of cannabis – was far in excess of what may be needed for personal consumption. In the absence of any explanation from the accused it is a fair inference the drug was obviously intended for some person, known or unknown to the accused. Or, to borrow the more elegant words of Lord Diplock in *Ong Ah Chuan*, it is a fair inference that the accused's purpose here was “to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find.”
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- G [6] Now, add to all this the demeanour of the accused when confronted by PW3. As we have already said, he began shivering and urinated in his trousers. These are sure signs of fear. If taken alone they may be equivocal in terms of evidentiary value. But there is the other evidence to which we have already adverted.
- H And when taken together, the conduct of the accused on being confronted lends strength to the *prima facie* inference that he had *mens rea* possession of the proscribed drug. We may add that evidence of the accused's such conduct is plainly admissible by virtue of s. 8 of the Evidence Act 1950.
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[7] In *Prakash Chand v. State* AIR [1979] SC 400, Chinnappa Reddy J when delivering the judgment of the Supreme Court of India said:

... in *Zwinglee Ariel v. State of Madhya Pradesh* (AIR [1954] SC 15), this Court appeared to be inclined to hold that evidence to the effect that the accused started trembling and showed signs of being frightened on being questioned by the Police officer, if proved, was admissible; and, in *Rao Shiv Bahadur Singh v. State of Vindh Pra* (AIR [1954] SC 322), and *State of Madras v. A. Vaidyanatha Iyer* (AIR [1958] SC 61), this Court actually relied on evidence relating to the conduct of the accused on being confronted by the Police Officer with the allegation that he had received a bribe. In *Rao Shiv Bahadur Singh's* case the evidence relating to conduct on which reliance was placed was to the effect that the accused was confused and could furnish no explanation when questioned by the Police officer. In *Vaidyanatha Iyer's* case also evidence to the effect that the accused was seen trembling and that he silently produced the notes from the folds of his dhoti was acted upon. We, therefore, do not see any reason to rule out the evidence relating to the conduct of the accused which lends circumstantial assurance to the testimony of PW6.

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[8] In our respectful view, the learned trial judge did not adequately evaluate the prosecution's evidence and draw the irresistible inferences admitted by that evidence. Had he done so, he would have come to the conclusion that the prosecution had made out a *prima facie* case of trafficking. This, then, in our view is the first error into which the learned judge fell.

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[9] There is a second infirmity in the learned judge's judgment. It is this. He appears to have provided an explanation for the accused's conduct on being confronted by the police. He said that the accused's conduct was equally consistent with guilt of an unrelated offence, namely, being present in the country illegally. However, there is not a scintilla of evidence to support such a conclusion. It was clearly for the accused to give an explanation as to why he behaved in the manner in which he did. It was also for him to rebut the presumption of trafficking raised against him by the operation of s. 37(da) of the Act. In our respectful judgment, the learned judge misdirected himself in providing an explanation for the accused which the latter was bound to provide in the usual way.

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[10] For the reasons given we found the order of the learned judge unsupportable. It was set aside. We also ordered that the matter be remitted to the same learned judge with a direction to him to call upon the accused to enter his defence on the original charge of trafficking.

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